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NO. ~~75881-7~~ J. HERRITT

SUPREME COURT OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington
nonprofit corporation
Plaintiff/Petitioner,

v.

FHC, LLC, a Washington limited liability company,
Defendant/Third Party Plaintiff/Respondent/Cross-Appellant,

v.

AMERICA 1ST ROOFING & BUILDERS, INC., a Washington
corporation; CASCADE UTILITIES, INC., a Washington corporation;
MILBRANDT ARCHITECTS, INC., P.S., a Washington corporation;
PIERONI ENTERPRISE, INC. d/b/a PIERONI'S LANDSCAPE
CONSTRUCTION, a Washington corporation; TIGHT IS RIGHT
CONSTRUCTION, INC., a Washington corporation,

Third Party Defendants/Cross-Respondents.

**BRIEF OF CROSS-RESPONDENT MILBRANDT ARCHITECT'S,
INC., P.S.**

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III. RESTATEMENT OF THE ISSUE

Did the trial court properly grant Cross-Respondent Milbrandt Architects, Inc. P.S.'s ("Milbrandt") Motion for Summary Judgment in holding that, under the Washington Limited Liability Act, once two years passed after Cross-Appellant FHC, LLC's administrative dissolution, FHC, LLC could no longer prosecute claims against any of the third party defendants/cross-respondents?

IV. ARGUMENT

A. The Trial Court Properly Granted Milbrandt's Motion for Summary Judgment In Holding That, Under the Washington Limited Liability Act, Once Two Years Passed After FHC, LLC's Administrative Dissolution, FHC, LLC Could No Longer Prosecute Claims Against The Cross-Respondents.¹

1. Summary of the relevant facts:

Cross-Respondent Milbrandt is a Washington Corporation, and was on one of several Third Party Defendants brought into the underlying action by Cross-Appellant FHC, LLC ("FHC"). CP 32. Prior to filing its third party complaint, FHC had been administratively dissolved by the Secretary of State on March 24, 2003. CP 53, 54. Over two years later on May 6, 2005, FHC, while in both a dissolved and canceled status, filed a third party complaint against Milbrandt,

¹ Milbrandt incorporates by reference all of the factual statements and legal arguments submitted on behalf of the other cross-respondents.

along with other third parties. CP 32. The third party complaint against Milbrandt was not served until May 12, 2005. CP 93. Subsequent to being served with the third party complaint, Milbrandt moved for summary judgment pursuant to RCW 25.15.290(4), arguing that FHC lacked the legal capacity to prosecute claims. CP 63B, 93. On September 30, 2005, the Trial Court entered a separate Order dismissing, with prejudice, all claims against Milbrandt. CP 100. The Trial Court entered separate dismissal orders for each of the Third Party Defendants. CP 100-103. FHC did not file a Notice of Appeal as to these dismissals until January 13, 2006. CP 276-300.

2. The State of Washington requires full compliance with the provisions of the Limited Liability Companies Act in order for a limited liability company to maintain its legal status:

In 1994, Washington passed Revised Code of Washington ("RCW") Chapter 25.15, known as the Washington Limited Liability Companies Act ("Act"), authorizing the use of the new form of business entity. The Act defines an LLC as follows:

"Limited liability company" and "domestic limited liability company" means a limited company having one or more members that is organized and existing under this chapter.

RCW 25.15.005(4). In order to form a limited liability company in Washington, one or more persons must execute a certificate of formation

and file it with the Secretary of State. RCW 25.15.070. A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation. RCW 25.15.070(2)(c).

In order to avail itself of the benefits afforded to a limited liability company, including recognition as an entity, the limited liability must follow the guidelines adopted by the Washington Legislature. The Washington Secretary of State has express authority to administratively dissolve a limited liability company if, among other things:

- (1) The limited liability company does not pay any license fees, penalties, imposed by this chapter, when they become due; or
- (2) The limited liability company does not deliver its completed initial report or annual report to the secretary of state when it is due.

RCW 25.15.280. Accordingly, if full compliance with the statute terms is not being met, the limited liability company can be formally dissolved as a legal entity by the State of Washington and "may not carry on any business except as necessary to wind up and liquidate its business and affairs." RCW 25.15.285(3).

An accompanying provision of the Act specifically describes the limited “wind up” actions that may be carried out for a dissolved limited liability company:

Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the person winding up the limited liability company’s affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits whether civil, criminal, or administrative, gradually settle and close the limited liability company’s business, dispose of and convey the limited liability company’s property, discharge or make reasonable provision for the limited liability company’s liabilities, and distribute to the members of any remaining assets of the limited liability company.

RCW 25.15.295(2) (*emphasis added*). Importantly the Act mandates that these limited actions must be at least initiated prior to the filing of the certificate of cancellation by the State of Washington. RCW 25.15.295(2); RCW 25.15.080; RCW 25.15.290(4). In other words, a dissolved limited liability company cannot seek to prosecute lawsuits after the two year wind-up period has expired and the certificate of cancellation has been entered by the State. RCW 25.15.270(2)(c).

3. FHC made no effort to reinstate itself as a legal entity and therefore lacked the legal capacity to prosecute claims.

The Limited Liability Act states that “[a] limited liability company administratively dissolved under RCW 25.15.285 may apply to the Secretary of State for reinstatement within two years after the

effective date of dissolution. RCW 25.15.290(1). However, the Act sets forth the requirements that must be satisfied by the limited liability company's application for reinstatement. In particular, the Act states, in no uncertain terms, that application for reinstatement must be received within two years after the effective date of dissolution. RCW 25.15.290(1). The Act then states that if reinstatement is not sought within two years, the LLC is cancelled:

If an application for reinstatement is not made within the two-year period set for in [RCW 25.15.290(1)], or if the application made within this period is not granted, the **Secretary of State shall cancel the limited liability company's certificate of formation.**

RCW 25.15.290(4) (*emphasis added*).

As referenced above, pursuant to RCW 25.15.280 and RCW 25.15.295(1), the cancellation of the limited liability company's certificate of formation under RCW 25.15.290(4) marks the end of the period within which the dissolved limited liability company may wind up its affairs. This includes ending the LLC's right to "prosecute and defend suits." RCW 25.15.290(4)

In the present case, FHC had two years from the date of administration dissolution (i.e., until March 24, 2005) to achieve reinstatement. RCW 25.15.290(1). FHC did not apply for

reinstatement. FHC's certificate of formation was cancelled by law pursuant to RCW 25.15.290(4) on March 24, 2005. The cancellation of the certificate of formation terminated FHC's winding up period, including the right to file and prosecute a lawsuit, pursuant to RCW 25.15.295(2) and FHC was considered a dead entity as of March 24, 2005. RCW 25.15.270(2)(c). In spite of this, a dissolved and canceled FHC did not file the third party complaint against Milbrandt until May 6, 2005. CP 63B, 90.

The timeline here marks an important distinction between the argument forwarded by FHC in its opening response brief and the argument presented by Milbrandt. At the time Appellant Chadwick Farms Owners Association filed suit against FHC on August 18, 2004, FHC was administratively dissolved, but the LLC had not been formally cancelled by the State of Washington. CP 15-19. Yet despite being sued by Appellant, FHC did not take any actions to revoke its dissolved status between the period of August 18, 2004 through March 24, 2005, and in fact waited until May 6, 2005 - 2 months after being canceled - to file a third party complaint against Milbrandt. CP 1-19. Given this timeline, it is clear that FHC lacked standing to prosecute its third party complaint against Milbrandt, regardless of whether it had the legal capacity to defend against the claims brought by Appellant.

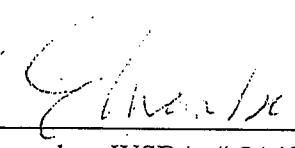
4. FHC's notice of appeal is untimely.

Finally, Milbrandt respectfully maintains that FHC's Notice of Appeal as to the claims against the cross-respondents is untimely. Pursuant to RAP 5.2(a), a notice of appeal must be filed within 30 days after entry of the decision of the trial court which the party filing the notice wants reviewed. The order dismissing Milbrandt from the underlying action was entered by the Court on September 30, 2005. CP 100. Again, this was a separate order from FHC's order of dismissal. However, FHC filed its Notice of Appeal on January 12, 2006. CP 276-300. Consequently, FHC's Notice of Appeal is untimely.

V. CONCLUSION

For the reasons set forth above, Cross-Respondent Milbrandt Architects, Inc., P.S. respectfully requests that the this Court affirm the trial court's dismissal of Cross-Appellant FHC's Third Party Complaint, and thus affirm the trial court's Order of Dismissal in all respects.

DATED this 7 day of May, 2006.



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CERTIFICATE OF SERVICE

BY C. J. HERRITT

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am ^{CLERK} now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served this BRIEF OF CROSS-RESPONDENT MILBRANDT ARCHITECT'S INC., P.S. on the following individuals in the manner indicated:

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DATED this 31st day of May, 2006 at Seattle, Washington

Rondi Moreau
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